

**Before the
Commission on Common Ownership Communities
Montgomery County, Maryland**

In the Matter of:

Whetstone Homes Corporation	:	
c/o John F. McCabe	:	
Suite 300	:	
200A Monroe Street	:	
Rockville, MD 20850,	:	
	:	
Complainant,	:	
	:	
v.	:	Case No. 21-06
	:	November 28, 2006
Trevor and Angela Hight-Walker, Owners	:	
c/o Weichert Property Management	:	
Suite 303	:	
444 N. Frederick Avenue	:	
Gaithersburg, MD 20877-2477	:	
and	:	
Kevin and Jennifer Groff, Tenants	:	
9701 Breckinridge Place	:	
Montgomery Village, MD 20886,	:	
	:	
Respondents.	:	

DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission, having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

Whetstone Homes Corporation (Complainant) filed a complaint with the Office of Common Ownership Communities on February 23, 2006, against Trevor and Angela Hight-Walker, owners of 9701 Breckinridge Place, a property within the Whetstone community, and Kevin and Jennifer Groff, their tenants, alleging that the Groffs are parking a pick-up truck in the driveway at that property overnight in violation of the rules and regulations of the community. Complainant requested that the Commission issue an

order to respondents to cease parking the truck at the property overnight unless it is in the garage.

The Groffs responded that they were not informed at the time of signing their lease that the community rules prohibited them from parking their truck outside overnight. They argued that the rule against parking pick-up trucks is unreasonable and unenforceable under the unreported decision of the Court of Special Appeals in *Montgomery Village Foundation v. Ellis*, No. 1494 (April 3, 2002). The Hight-Walkers have not responded to the complaint.

Inasmuch as the matter was not resolved through mediation, the dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e) on June 7, 2006, and the Commission accepted jurisdiction. The matter was scheduled for public hearing on August 12, 2006 and, at the request of respondents, was continued to August 23, 2006. A public hearing was conducted on that date at the conclusion of which the record was closed. After the hearing the Complainant notified the Commission that the Board would consider a proposed settlement at their next meeting and requested that the decision be delayed pending that consideration. On September 19, 2006, Complainant notified the Commission that the Board had declined to accept the proposed settlement and requested a decision from the Panel.

Findings of Fact

Whetstone Homes Corporation is a homeowners' association under the umbrella of Montgomery Village Foundation. The community documents were filed with the county land records in 1967. There are 447 units, all single family homes. The house at 9701 Breckinridge Place, Montgomery Village is within the Whetstone Community and is owned by Trevor and Angela Hight-Walker. Kevin and Jennifer Groff have rented the house for the period from June 2005 to September 2007.

When the Groffs were discussing the lease for this unit with the realtor they asked for a copy of the community documents and were told that the documents were large and could not be faxed. Apparently it did not occur to the parties to arrange for next day delivery. The Groffs, who had lived in common ownership communities in Texas and Alaska, asked whether there were unusual restrictions in the covenants and were assured there were not. The Groffs' application to the realtor did include the information that they have a pick-up truck and the realtor, who lives in the Whetstone community, apparently did not recognize that the truck might be a problem.

The Groffs own and drive a 1999 Dodge Ram pick-up truck which does not have a cap.

In accordance with the Whetstone Declaration of Covenants, Conditions and Restrictions, the community has adopted "Parking and General Vehicular Rules and Regulations." While there is no date for the original adoption of these regulations, the

record does indicate that they were first reaffirmed on September 14, 1989. They have been reaffirmed on an annual or biannual basis since and have been revised several times, most recently in September 2005. The regulations include a prohibition on parking “all vehicles which have an open-back [sic] and separate cab....regardless of whether or not they have a cap” overnight (12 midnight to 6:00 a.m.).¹ The Regulations do include provisions for exemptions and waivers. The Groffs have applied for an exemption and have been denied.

The record shows that there have been five applications for exemptions of which the Groffs’ is the only one denied. One was granted in 2003 for a capped truck which has since been sold. Three others have been granted since the Groffs’ application. One is for a six-month period for the son of the owners who is temporarily living with them. One is for up to a year for a capped truck conditioned on keeping it covered. The third is for intermittent use and was granted for six months but has been extended for another six months.

Minutes of a number of recent meetings of the Whetstone Board of Directors introduced into the record in this case reflect discussions of the vehicular parking policy and of the applications for exemptions. The Board is aware of the issues and has given some consideration to them.

Testimony at the hearing indicated that parking the truck in the garage overnight is acceptable. However, the garage does not accommodate the truck unless the garage door is left open. The Groffs were parking the truck in the garage and leaving the door open but it was an energy issue in cold/hot weather and there was some vandalism in the neighborhood that made the Groffs uncomfortable with the open garage door.

Discussion

In August 2000, a decision was issued by the Circuit Court for Montgomery County in an injunction action to enforce a similar parking covenant brought by Eastgate Homes Corporation, another Montgomery Village Foundation community, against a unit owner for parking a pick-up truck in violation of the covenant. The judge in *Montgomery Village Foundation, Inc., et al. v. Ralph Thomas Ellis, et al.*, Civil No. 203418, decided in favor of the unit and truck owners. The judge determined that the covenant on its face is reasonable and that it had been reasonably enforced and not waived or abandoned by the community. He then opined that the question of whether the application of the covenant to the pick-up truck with a cap at issue before him was reasonable presented him with a very close call. He decided that the community had not met the burden of demonstrating that the distinction between permitted and prohibited vehicles in light of all the facts was reasonable and denied the request of the community to enjoin the owners of this particular truck from parking in the community in violation of the covenant.

¹ Commonly vehicular parking is regulated overnight to control parking of residents without affecting service or delivery vehicles in the community to provide a benefit to residents.

Montgomery Village Foundation and Eastgate Homes Corporation appealed this decision to the Court of Special Appeals of Maryland (*Montgomery Village Foundation, Inc. et al. v. Ralph Thomas Ellis, et al.*, No. 1494). In an unreported opinion filed on April 3, 2002, the Court affirmed the decision of the Circuit Court, finding that the trial judge did not abuse the discretion permitted for denying an injunction. The Court of Special Appeals found that the opinion below was based largely on a comparison of the pick-up truck which was prohibited with photographs of other vehicles which are not prohibited. The Court also recited testimony regarding characteristics of trucks which a number of permitted vehicles shared with the prohibited vehicle. The Court of Special Appeals pointed out that the trial court has the discretion to grant or deny a request for injunctive relief and that their standard of review of that decision is whether the trial court abused that discretion.

The Court of Special Appeals recited language from *Kirkley v. Seipelt*, 212 Md. 127 (1956), a case, involving covenants to regulate architectural control, that is often quoted as the standard for enforcement of covenants:

[A]ny refusal to approve the external design or location by the Rodgers Forge Realty Corp. would have to be based upon a reason that bears some relation to the other buildings or the general plan of development; and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner.

Id. at 133.

The Court of Special Appeals observed that the trial court concluded that enforcing the restriction against parking the pick-up truck, based solely on aesthetics, was unreasonable. They suggested that the trial judge applied the doctrine of comparative hardship which provides that a court may decline to issue an injunction where the hardship and inconvenience which would result from the injunction are greatly disproportionate to the harm to be remedied, citing *Chevy Chase Village et al. v. Jaggers et ux.*, 261 Md. 309, 320 (1971).

Maryland Rule 1-104, “Unreported opinions” provides that “[a]n unreported opinion of the...Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.”

In the case under consideration, it was indicated at the hearing that the regulation against parking pick-up trucks is intended as an aesthetic standard and that the concern was the profile of a pick-up truck. A number of pictures of vehicles that are permitted to park in the community as well as a picture of the subject truck were introduced into the record.

The prohibition against parking a pick-up truck, capped or uncapped, has been in effect in this community for a long time. Most of the homeowners have bought their units with actual or constructive knowledge of this regulation. It is one of a number of regulations that the owners in this community, like other common ownership

communities, live with; one of a number of otherwise reasonable rights that these homeowners forebear for the benefit of an overall environment. Unit owners commonly have expectations that the community regulations will be complied with or enforced.

Further, vehicular restrictions on parking pick-up trucks and other large or commercial looking vehicles are not uncommon in Montgomery County common ownership communities. Such a restriction may have been uncommon in Texas and Alaska where the Groffs had previously lived, but the realtor who told them that there were no unusual restrictions in the Whetstone documents was not incorrect on this issue. Her failure to either send the community documents or recognize the issue from the Groffs' application is of greater concern.

The profile of an uncapped pick-up truck is reasonably distinct from the other large vehicles, many of them on truck chassis, which have become popular private passenger vehicles. However, when a cap is placed over the truck bed the profile becomes quite similar to a number of other large vehicles. During the time since this regulation was originally adopted the size, shape and profile of popular private passenger vehicles has changed considerably. The record in the Court of Special Appeals includes an impassioned plea by the attorney for Eastgate, John McCabe, who also represented Whetstone in this proceeding, on behalf of his client, about the distinctiveness of a pick-up truck, capped or uncapped; but with regard to a capped pick-up truck not everyone is so discerning.

The Board of Directors is the legislative body for a common ownership community and the most appropriate agency to promulgate regulations for coordinated cohesive aesthetic standards. There was no testimony at the hearing in this case to explain the concerns of the Whetstone Board in enforcing this regulation against the Groffs or in granting some exemptions and denying the Groffs application. The Panel does not propose to second guess the reasoning of the Board of Directors in this case. However, the decision in the Eastgate case reflects the difficulties presented by the changes in vehicular profiles since this regulation was first adopted. It is tempting to retain a regulation to which the community has agreed, but as usage and tastes change the common understanding of the community environment that supported the regulation at the time it was adopted may lose its clarity or cease to reflect the consensus. When that happens the regulation may be vulnerable to revision on a case-by-case basis distorting or disrupting a community design.

The Panel does recommend that if the Groffs agree to install a cap on their truck which will change the profile of the pick-up truck to one similar to a permitted vehicle, that the Board again consider granting an exemption to the Groffs for the remainder of the term of their lease. Enforcement against the Groffs is a significant hardship, the period is less than a year, and the responsibility for their predicament is shared with the realtor and unit owners. The Board and community also should give further consideration to the aesthetic regulation of large vehicles in light of the current popularity of these vehicles. Additionally, it is strongly recommended that the Board direct that a

communication be sent to all unit owners reminding them of this regulation, particularly if they are considering renting their unit.

Conclusions of Law

The Hight-Walkers, the owners of this house, who have not responded to the complaint, are the members of the Whetstone Homes Corporation and are bound by the community documents. They cannot convey to tenants any greater rights than they have in the property. The restriction on parking pick-up trucks in the community overnight would apply to them as it also applies to their tenants.

The parking regulations prohibit parking a pick-up truck, not garaged, in the community overnight. There is evidence that this regulation has been enforced with reasonable consistency and not waived or abandoned.

The Groff's' pick-up truck at the time this case was filed was uncapped. The prohibition as applied to an uncapped pick-up truck is not unreasonable.

ORDER

Based on the evidence of record, for the reasons stated above, it is hereby ordered that the Groff's shall have forty-five (45) days from the date of this decision, or until January 12, 2007, to renew their application for an exemption from the regulation prohibiting outdoor parking of their pick-up truck if they are willing to install a cap that will make the profile of the truck similar to that of vans and SUVs. The Board shall give serious consideration to the application and the reasons therefore. If the Board denies the exemption, the Groff's have 30 days from the date of being notified of the Board's decision to make arrangements for parking their pick-up that are in compliance with the Whetstone regulation and will not thereafter park their truck in violation of those regulations. Whetstone will forebear to enforce the regulations until such time as the exemption application has been acted upon and for the described period thereafter.

The foregoing is concurred in by Commissioners Kevin Gannon and Vicki Satern Vergagni.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, under the Maryland Rules of Procedure.

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership Communities